No. 14,850

In the

United States Court of Appeals

For the Ninth Circuit

FAYE M. BARRAS, et al., *Appellants,* vs. SALT RIVER VALLEY WATER USERS' ASSOCIATION, an Arizona Corporation, *Appellee.*	}

Appellants' Opening Brief

Appeal from the United States District Court
for the District of Arizona

HERBERT B. FINN
125 West Monroe Street
Phoenix, Arizona

G. W. SHUTE
W. T. ELSING
505 Title & Trust Building
Phoenix, Arizona

Attorneys for Appellants

FILED

FEB 1 1956

PAUL P. O'BRIEN, CLERK

PARKER PRINTING COMPANY, 180 FIRST STREET, SAN FRANCISCO 5

INDEX

	Page
Jurisdictional Matters	1
Statement of the Case	2
The Issue Involved	4
Specifications of Error	5
Argument	7
I. The Wives Performed Services which were Indispensable to the Operation of the Company's Business	7
II. The Zanjero could not properly Operate His Division without his Wife's Help	9
III. The Company knew that the Wives were doing the Work	10
IV. The Company Required the Wives to Work	12
V. The Evidence Proves that the Wives were Employees of the Company and Entitled to be Paid for the Actual Hours that they Worked	14
Conclusion	17
Appendix.	

TABLE OF AUTHORITIES

CASES — Pages

Fox v. Summit King Mines, 9 Cir., 1944, 143 Fed. 2d 926 16

Jackson v. Derby Oil Co., 1943, 157 Kan. 53, 139 Pac. 2d 146 16

Mabee Oil and Gas Co. v. Thomas, 1945, 195 Okla. 437, 158 Pac. 2d 713, 169 A.L.R. 1318 16

McComb v. Homeworkers Handicraft Co-op, 4 Cir., 1949, 176 F2d 633 16

National Labor Relations Board v. Hearst Publications, Inc., 1944, 322 U.S. 111, 64 S.Ct. 851, 88 L. Ed. 1170 15

Neal v. Braughton (DC Ark.) 1953, 111 FS, 775 16

Reynolds v. Salt River Valley Water Users' Ass'n., 9 Cir., 1944, 143 F2d 863 3

Rutherford Food Corp. v. McComb, 1947, 331 U.S. 722, 67 S.Ct. 1473, 91 L. Ed. 1772 16

Tennessee Coal, Iron & R. R. Co. v. Muscola Local No. 123, 1944, 321 U.S. 590, 64 S.Ct. 698, 88 L. Ed. 949 14

Walling v. Jacksonville Terminal Co., 5 Cir., 1945, 148 F2d 768 16

Walling v. McKay, DC Neb. 1946, 111 Fed Supp 160, aff'd 8 Cir., 1947, 164 F2d 40 16

STATUTES

28 U.S.C. § 1291 1

29 U.S.C. § 151 15

29 U.S.C. § 201 5

29 U.S.C. § 203 ...... 4, 17

29 U.S.C. § 206 ...... 2, 7

29 U.S.C. § 216 1

No. 14,850

In the

United States Court of Appeals

For the Ninth Circuit

Faye M. Barras, et al.,
Appellants,

vs.

Salt River Valley Water Users' Association, an Arizona Corporation,
Appellee.

Appellants' Opening Brief

Appeal from the United States District Court
for the District of Arizona

JURISDICTIONAL MATTERS

On May 27, 1955 the United States District Court for the District of Arizona, Honorable Dave W. Ling presiding, made its Findings of Fact and Conclusions of Law (T.R. 48) and entered Judgment for the defendant below. (T.R. 52). On June 24, 1955, the plaintiffs below filed their Notice of Appeal (T.R. 53). The lower court, on July 26, 1955, extended the time for filing the record and docketing the appeal to August 17, 1955. It was filed on August 1, 1955 (T.R. 838). The lower court had jurisdiction by virtue of 29 U.S.C. § 216 (Fair Labor Standards Act). This court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE CASE

This action was brought to recover unpaid wages by thirty-five women who contend that they were employees of the Salt River Valley Water Users' Association (hereafter referred to as the "Company"), a private corporation. Their husbands were joined as parties. On November 28, 1950 they filed a complaint, which was later amended (T.R. 18). It alleges that for two years prior to the filing of the complaint they were employed by the Company to do clerical work and work pertaining to the sale, distribution and delivery of water, the distribution of water for agricultural and other purposes being one of the functions of the Company. They further alleged that the Company failed to pay them anything for their services. They set up facts to the effect that the Company was subject to compliance with the Fair Labor Standards Act of 1938 as amended, 29 U.S.C. § 206,[1] which reads:

> "(a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—(1) not less than 75 cents an hour; * * *" [prior to January 25, 1950 the minimum was 40 cents per hour]

The Company filed an amended answer. It is not printed in the Transcript of Record and so is added to this Brief as Appendix A. Among other matters it alleges that any work or service performed by the women plaintiffs was done without its knowledge, was voluntary, and was performed without expectation of compensation; and denies that the women plaintiffs were its employees.

---

1. The Act of 1938 (52 Stat. 1060) was amended by the Portal-to-Portal Act of 1947 (61 Stat. 84); by the Acts of July 20, 1949, C. 352 and Oct. 26, 1949, C. 352, 63 Stat. 446. The latter amendment took effect as of January 25, 1950.

It raised the issue as to the applicability of the Fair Labor Standards Act but it offered no proof at the trial to the effect that it was exempt from the operation of that Act or that the women plaintiffs were not covered by the Act.

A companion case, *Sturdivant, et al. v. Salt River Valley Users' Association, an Arizona Corporation;* was tried immediately following this case. The records of the two cases are consolidated. It was stipulated that the testimony of the witness Ronald Arden Wright given in the *Sturdivant Case* (T.R. 790 et seq.) would be considered as a part of this case (T.R. 810).

The lower Court held that the women plaintiffs were not employees of the Company and entered judgment accordingly (T.R. 52). Hence, this appeal.

The facts show generally that waters are collected from a 13,000-square-mile water shed; are converged at Granite Reef Dam near Phoenix, Arizona, where they are diverted into canals. From the canals the water flows into laterals and ditches and from them is distributed to the lands of farmers and other users in the Salt River Valley. The water supply from Granite Reef Dam is augmented by pump waters (T.R. 322).

The area in which the water is used was, during the times pertinent to this action, divided into sixty-two divisions. Each division was ordinarily in the charge of a zanjero, who was an employee of the Company (T.R. 63, 318). It was his responsibility to see that the water was delivered to the user in the quantities and at the times the user ordered. He was engaged in the production of goods for interstate commerce (T.R. 86 and see *Reynolds v. Salt River Valley Water Users' Ass'n.*, 9 Cir. 1944, 143 F2d 863).

The women appellants are all wives of zanjeros (T.R. 318). They lived with their husbands in zanjero stations on

their respective divisions (T.R. 63). The specific duties which they performed are described in detail in the argument below.

It will be seen that there is surprisingly little conflict in the evidence. Three witnesses who were married to zanjeros and who are not parties to this action did testify in effect that they were not employees of the Company (T.R. 372, 386, 390). But, of course, that does not contradict the testimony of the parties and other witnesses who testified to facts establishing that these appellants did work for the Company.

To avoid awkward appellations, in this brief the women appellants are referred to as "the wives".

THE ISSUE INVOLVED

The sole issue in the case is whether or not the wives were employees of the Company within the meaning of the Fair Labor Standards Act of 1938, as amended. During the period covered by this action the following definitions from that Act were effective:

Title 29 U.S.C. § 203. As used in this Act—

> (a) "Person" means an individual, partnership, association, corporation, business trust, legal representative, or any group of persons.
>
> * * * * * * *
>
> (d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.
>
> (e) "Employee" includes any individual employed by an employer.
>
> * * * * * * *
>
> (g) "Employ" includes to suffer or permit to work.

All the specifications of error relate to this fundamental issue and can best be argued as one. It will be shown that the lower Courts' material findings were not supported by any substantial evidence and that in practically every instance, testimony by the Company's own witnesses refute the findings.

SPECIFICATIONS OF ERROR

I.

The Court erred in making the following Conclusions of Law (T.R. 51):

"I.

> Defendant did not at any time material herein, suffer or permit plaintiffs to work for it, and, therefore, defendant did not employ plaintiffs."

"II.

> In that defendant did not employ plaintiffs, the provisions of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C.A., Sec. 200 [sic], et seq., are not applicable."

These Conclusions of Law are clearly erroneous in that the undisputed evidence shows that the wife-appellants were suffered and permitted to work for appellee and therefore come within the definitions of the Fair Labor Standards Act of 1938 with respect to employees.

II.

The Court erred in making the following Finding of Fact:

"VI.

> The zanjero wife, including these women plaintiffs, were not required by defendant to perform any duties

as a condition of their husband's employment. Plaintiffs received no instructions from defendant; and defendant had no policy whereby it requested the zanjero to instruct his wife with respect to duties to be performed by her. Defendant exercised no control over plaintiffs with respect to the manner in which they used their time or with respect to their activities; plaintiffs at all times were at liberty to, and did leave the premises at any time and it was not necessary for plaintiffs to notify defendant at any time concerning such departures; some wives, including some plaintiffs, were employed regularly away from the divisions by persons other than defendant with or without the knowledge of defendant, and without objection by the defendant." (T.R. 50)

This Finding of Fact is erroneous and not warranted in that the evidence clearly proves that all the wives were required by the Company to perform work as a condition to their husbands' employment; and that the appellee exercised control over the wives with respect to the time as to when they could leave and return to the zanjero stations.

III.

The Court erred in making the following Finding of Fact:

"VII.

Any work performed by zanjero wives, including plaintiffs, for the benefit of defendant was work performed voluntarily, unknown to the defendant, and not under the direction and control of defendant, but at the request of their husbands. The extent of the assistance of the zanjero wife to the husband was controlled by the husband; in many cases the wife did not in any manner assist the husband in the performance of his duties; in other cases the husband induced the wife to assist him in varying degrees. Assistance by the wife

or other members of the family was not necessary for the efficient performance of the zanjero's duties. All such work performed by plaintiffs was work for which the husband was paid by defendant pursuant to the terms and conditions of the collective bargaining agreement between the defendant and the zanjeros." (T.R. 50, 51)

This Finding of Fact is erroneous and not warranted in that the evidence clearly proves that the work that wives performed was required by the very nature of the job of the zanjeros; that the duties of the zanjeros were so planned and devised so that the proper performance of the duties of the zanjeros was impossible without the help of the wives. The evidence clearly proves that the Company required the performance of labor by the wives; that the extent of the work of the wives was controlled not by the zanjeros but by the extent of the duties on the division and by the amount of time that the zanjero spent in the field. There was no evidence that the zanjero was paid for all the work done by his wife nor any evidence of how much the Company paid the zanjero for work performed by his wife.

IV.

The Court erred in entering Judgment for the Company (T.R. 52), for the wives were "employees" under 29 U.S.C. § 206(a), the Company was an "employer" not exempt from complying with that section, and the Company did not pay such employees for actual hours worked by them.

ARGUMENT IN SUPPORT OF SPECIFICATION OF ERRORS NUMBERS I TO IV

I. The Wives Performed Services Which Were Indispensable to the Operation of the Company's Business.

The wives did company work. This is not disputed. They all lived at zanjero stations, "as servants and not as tenants"

(T.R. 205), where the Company had telephones, some office equipment, and office files relating to the distribution of water in the zanjeros' respective divisions (T.R. 85). Their tasks consisted of the following: answering business telephone calls. In the busy season there would be from twenty-five to fifty calls a day; in the slack seasons, about ten (T.R. 195, 220).[2] They would also make telephone calls to farmers, other water users, to the Company's head office (T.R. 89, 220), and to the Watermasters who were the zanjero supervisors (T.R. 148). The wives kept various records and filled out various reports such as Town Site reports (T.R. 87), Zanjero Advance Service Cards (T.R. 98, 254), Name and Address Cards; Buy, Legal Description Cards; Continued Run Cards (T.R. 197), Crop Reports showing what crops farmers were growing (T.R. 198), Subdivision Water Schedules, copied lateral reports (T.R. 197) and made out A.V.O.'s, which were memos to the Company concerning matters which the zanjeros were required to communicate, such as structures that needed repairing, laterals that needed cleaning, and so forth. (T.R. 71). They did clerical filing work (T.R. 223), and checked credit balances of water users (T.R. 220). In some instances they worked in the field, turning in water, making farm changes (T.R. 223), operating gates (T.R. 232), and cleaning ditches (T.R. 194). They took orders from farmers who came to their stations (T.R. 86). When there was trouble in a division, such as a flood (T.R. 220), they reported it (T.R. 86).

The wives spent a minimum average of about three hours a day on business telephone calls (T.R. 90); and five hours in keeping records (T.R. 94).[3]

---

2. Generally from the first of the year to March was slack (T.R. 195).

3. Five of the zanjero's wives testified in regard to the tasks they performed. It was stipulated that if the other wives were called, they would testify to substantially the same thing (T.R. 329).

The work that was done by the wives was work which was assigned to the husband-zanjero's division, and work which he could not do because (1) he did not have the time, being engaged on other Company business and (2) because he could not be in the field and at the telephone at the same time (T.R. 194).[4]

II. The Zanjero Could Not Properly Operate His Division Without His Wife's Help.

The zanjeros were in the field working from twelve to eighteen hours a day (T.R. 95, 168, 204). The work which they performed was so time-consuming that they could not do the required jobs performed by their wives. (T.R. 89). Although a company man testified that it was "fifty-fifty", (T.R. 404), a disinterested witness testified that except in a "very few cases" the telephone calls were taken by the wife (T.R. 246). From ninety to ninety-five per cent of the time when a farmer went to a zanjero station, it would be the wife who would take his instructions (T.R. 442).

Without a wife's help, the zanjero could not operate his division (T.R. 252, 445, 460). "You will never be a free woman after you get on that job * * * because your time is the Water Users'" (T.R. 287). The work required two people (T.R. 194). The wife had to help (T.R. 215).

One of the wives testified that because of the necessity of someone being at the station at all times she had to give up church work and had to refuse work in the Parent-Teachers Association (T.R. 223). Another wife said that she had to give up the idea of doing substitute teaching because "it is

4. At the time of the trial, the Company was experimenting with a "zone system". Under it, a zanjero (called waterman) worked eight straight hours. There were three shifts. It took thirty-three men to do the same work as fifteen zanjeros under the old system (T.R. 209). The watermen's cars had radio telephones and was apparently a more efficient mode of operation (T.R. 427).

an understood thing that the zanjero's wife stay at home and answer the phone for their husband and help them in whatever way they can" (T.R. 287). It is true that one wife was a dressmaker. However, her work was done at home with the exception of the times that she left to take fittings. But even then, a lady was hired to remain at the station to take calls (T.R. 154 et seq.). That it took two to run a division is proven by the fact that when the wife of one of the zanjeros died, the Company put an extra zanjero on the division to answer the telephone (T.R. 431, 455).

III. The Company Knew That the Wives Were Doing the Work.

The lower Court found that the Company did not know that the wives worked (T.R. 50). This Finding is absolutely contrary to the evidence. The wives were telephoning the Company's office to check on farmers' credit balances, reporting floodings (T.R. 220), getting correct addresses, and calling about water (T.R. 89). The Company's office would telephone the wives and pass on complaints and orders to them (T.R. 215, 445). The reports sent into the Company were in the handwriting of the wives as well as their husbands (T.R. 251).

The Company attempted to refute this by the testimony of one of its witnesses, who said (T.R. 404): "I have never instructed the wives. I have left instructions with the wife to pass on to the husband * * * telling him when his water would be there or how many inches of water to let through in the canal at a specific time." But this in itself constituted an instruction to the wife. On receiving such a call, she would try to locate the zanjero, would call places where she thought he might be passing (T.R. 173)[5] to have him waved

5. Some of the zanjero stations were on ten-party telephone lines with other industrial users (T.R. 93, 202). Sometimes "you can try as long as an hour" to place a call (T.R. 201).

down (T.R. 186). If the wife were notified by the Company that water was coming to a farmer and the farmer had no telephone, the wife would make the water change herself if her husband was out in the field (T.R. 225).

These activities were not isolated ones. They were not done merely in response to a casual and occasional request for a favor. The Company operated on a twenty-four hour day, seven days a week (T.R. 116, 180, 409, 531). The telephone calls, the making of reports, the information that had to be communicated between the wives and the water users and the wives and the Company obviously went on without ceasing during the entire year.

That the Company knew and expected the wife to work is further established by the following answers of a supervisor (T.R. 120):

> "Q. Is it a rule that somebody must be at the phone [at a zanjero station] at all times?
>
> A. I wouldn't say it is a rule. I would say it is customary.
>
> Q. And by 'somebody', does that necessarily mean the zanjero?
>
> A. Well, it can be the zanjero, zanjero's wife or whoever he designates as somebody competent to receive the calls."

Another supervisor for the Company was asked (T.R. 396):

> "Did you, as a Watermaster, ever advise a zanjero that his wife was required to assist him in connection with his job?
>
> A. No; I have always made it a point to instruct the zanjero and if he wished to push any of that work off on his wife he could instruct her how to do the work.
>
> Q. Do some of them push the work off on their wives?
>
> A. I think so."

For reasons given below, the wives were so imbued with the idea that they had to attend to their zanjero stations they would generally not leave them without Company permission. So, a wife testified in answer to the following question (T.R. 92):

> "Q. * * * Do you recall any time during employment that you left the house for any period of time?
>
> A. Well, yes, I had to leave one time to go to see my mother. She had been ill so Mr. Harper [her husband] called the Association and asked them if it would be all right for me leaving and the Watermaster asked him if there would be someone there to take care of the telephone and he told them yes, that he would have someone to take care of the telephone while I was gone so they told him it would be all right then for me to go.

Another wife testified (T.R. 151):

> "* * * So I asked him [a Watermaster]—I said, 'I have a chance to do some other work. If I have someone here to answer the phone is it all right for me to do other work?'
>
> "He said, 'As long as there is someone here to answer the phone, that is all that is necessary.' I hired a woman * * *"

IV. The Company Required the Wives to Work.

The foregoing, it is submitted, establishes that the wives were working for the Company; the Company knew it; and by implication demanded it as a condition of employment for the zanjeros. There is other forcible evidence.

For example, a witness testified that when he applied for a job, the assistant to the General Superintendent (T.R. 161) "asked me if I was married, if my wife worked and told me she would have to help out by taking telephone

calls and orders, the orders of the farmers that came to the door" (T.R. 248). The same official told another applicant for a zanjero job, "that it was necessary for me to be married in order that my wife might help me with my duties" (T.R. 82). A Watermaster told one of the wives that it was her part to do everything that she could to help her husband in running the division in the way that it should be run (T.R. 151).

The General Superintendent of the Company (T.R. 161) told some of the zanjeros after a meeting:

> "There is a zanjero in Mesa, his wife won't stay at home and answer telephone calls and if she won't stay at home or if he can't get her to stay at home we are going to have to do something about it. We are going to have to let that man go."

It was a policy of the Company to employ only married men as zanjeros (T.R. 82, 83, 214).[6] The Company's reason was that they hired married men because of their greater stability and their willingness to work the irregular hours (T.R. 423). Considering all the testimony, however, it may readily be deduced that the primary reason was so that the Company could have the services of the wives. This can be demonstrated.

The zanjero could not carry on his work without a telephone. So said the Company (T.R. 328). Now, a telephone

---

6. The appellants' evidence overwhelmingly proved that it was a *requirement* that the zanjeros be married. A few extracts from the Transcript are: "I was told [by the assistant to the General Superintendent] that I wouldn't be able to go to work until the time that I married" (T.R. 82). "I missed one job because I wasn't married. * * * Another job came up * * * [The General Manager] asked me how long would it take me to get married and I told him not very long, and so we were married on June 29 and I went to work on June 30, '37" (T.R. 215).

without anyone to answer it is equivalent, of course, to no telephone at all.

The Company had mailed cards to all its shareholders requesting them to place their water orders between 7:00 a.m. and 3:00 p.m. (T.R. 176). It was between these hours that the Company believed that most of the zanjeros would be in the field, for it contended that a good zanjero was able to schedule his water for distribution during the day (T.R. 123). It follows that the Company expected the man to be in the field while the woman was in the office. It was unquestionably for that reason that the Company employed only married zanjeros and demanded that their wives remain at the station and work. All this is high-lighted by a good illustration. When one of the wives had a baby, the Company installed a telephone extension by her bedside (T.R. 197).

V. The Evidence Proves That the Wives Were Employees of the Company and Entitled to Be Paid for the Actual Hours That They Worked.

"Work" is distinguished from the physical or mental exertion required to do "something undertaken primarily for pleasure, sport, or immediate gratification, or as merely incidental to other activities (as a disagreeable walk involved in going to see a friend or the packing of a trunk for a pleasure trip * * *" *Tennessee Coal, Iron & R. R. Co. v. Muscoda Local No. 123,* 1944, 321 U.S. 590, 64 S. Ct. 698, 88 L.Ed. 949, footnote 11.

No one ever would contend that the zanjero duties performed by the wife were for her pleasure, sport, and so forth. There is no doubt that she "worked". The question is: for whom did she work? Who was her employer? The employer necessarily would have to be either the Company or the wife's husband. Admittedly, the husband derived a bene-

fit from the wife's work. If the wife had not taken telephone calls, for example, it would have driven one of appellee's witnesses "crazy" (T.R. 365). If the wife had not worked, the husband would have lost his job (T.R. 191). But essentially, if the wife did not work, the Company would have had to hire additional help (see the facts under II, above). It must be concluded that the Company was the employer. Even under the common law definition of master and servant, the wives were probably employees of the Company. But the limitations of the common law are not applicable under the definitions of the Fair Labor Standards Act. In *National Labor Relations Board v. Hearst Publications, Inc.,* 1944, 322 U.S. 111, 64 S. Ct. 851, 88 L.Ed. 1170, it is said:

> "Congress, on the one hand was not thinking solely of the immediate technical relation of employer and employee. It had in mind at least some other persons than those standing in the proximate legal relation of employee to the particular employer involved in the labor dispute. It cannot be taken, however, that the purpose was to include all other persons who may perform service for another or was to ignore entirely legal classifications made for other purposes. *Congress had in mind a wider field than the narrow technical legal relation of 'master and servant', as the common law had worked this out in all its variations,* and at the same time a narrower one than the entire area of rendering service to others. The question comes down therefore to how much was included of the intermediate region of between what is clearly and unequivocally 'employment' by any appropriate test, and what is as clearly entrepreneurial enterprise and not employment."

Although the case just cited involved the National Labor Relations Act, 29 U.S.C. § 151 et seq., the same liberal inter-

pretation required to effectuate the social legislation of the Fair Labor Standards Act applies to the latter. *McComb v. Homeworkers Handicraft Co-op,* 4 Cir., 1949, 176 F2d 633; *Rutherford Food Corporation v. McComb,* 1947, 331 U.S. 722, 67 S. Ct. 1473, 91 L.Ed. 1772.

In the *Homeworkers Case,* the Court said that common law rules as to distinctions between servants and independent contractors throws little light on who are employees within the meaning of the act.

The key words "to suffer and permit" have been the recipients of some attention by the courts in various situations that have arisen under the Fair Labor Standards Act. Thus this Court has held that these words mean work done with the knowledge of the employer. *Fox v. Summit King Mines,* 9 Cir., 1944, 143 Fed. 2d 926. See, also, *Mabee Oil and Gas Co. v. Thomas,* 1945, 195 Okla. 437, 158 Pac. 2d 713, 169 ALR 1318; *Jackson v. Derby Oil Co.,* 1943, 157 Kan. 53, 139 Pac. 2d 146. A more recent District Court decision, *Neal v. Braughton,* D.C. Ark., 1953, 111 Fed. Supp. 775 sums it up as follows:

> "The term 'employee' includes to suffer or permit to work. 29 U.S.C.A. Sec. 203 (g) Walling v. Jacksonville Terminal Company, 5th Circuit, 148 Fed. 2d 768. The words 'to suffer or permit to work' do not mean that permitting someone to work for a third person or worker's own self constitutes a person an employer bound to pay statutory wages. They mean that a person is an employer if he permits another to work for him, though he has not expressly hired or employed him. Walling v. Jacksonville Terminal Company, supra, Walling v. McKay, 70 Fed. Supp. 160, [Aff'd in 8 Cir., 1947, 164 F2d 40] and the words 'suffer' and 'permit' mean with the knowledge or consent of the employer. Fox v. Summit King Mines, 143 Fed. 2d 926, 932;

Mabee Oil & Gas Company v. Thomas, 158 P.2d 713, 169 ALR 1318."

The Company knew that the wives were working. It admittedly never instructed them not to do the work (T.R. 416). It therefore suffered or permitted them to work within the meaning of 29 U.S.C. § 203(g).

CONCLUSION

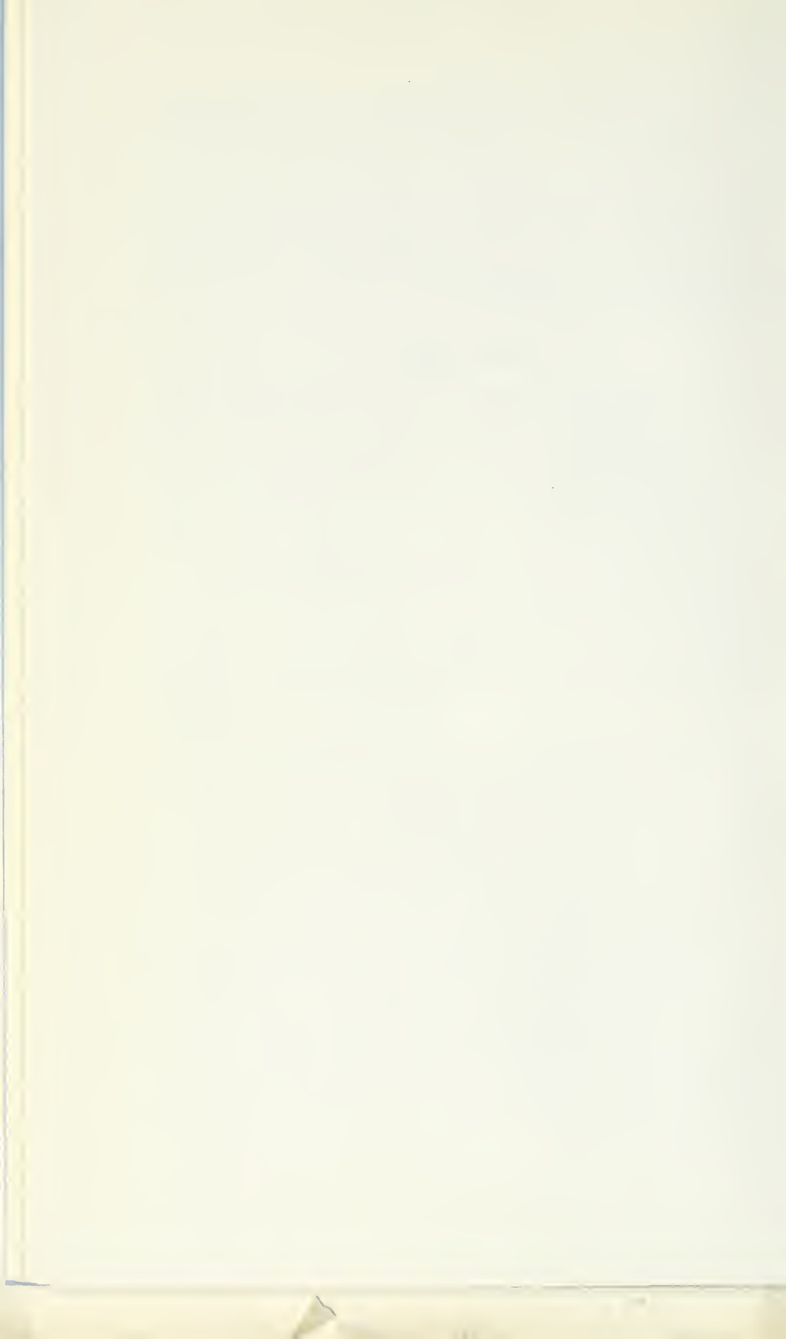
It is respectfully submitted that the judgment of the lower Court should be reversed with instructions to enter judgment for the wives and for a determination of the issue on whether or not the wives are entitled to liquidated damages and attorneys' fees.

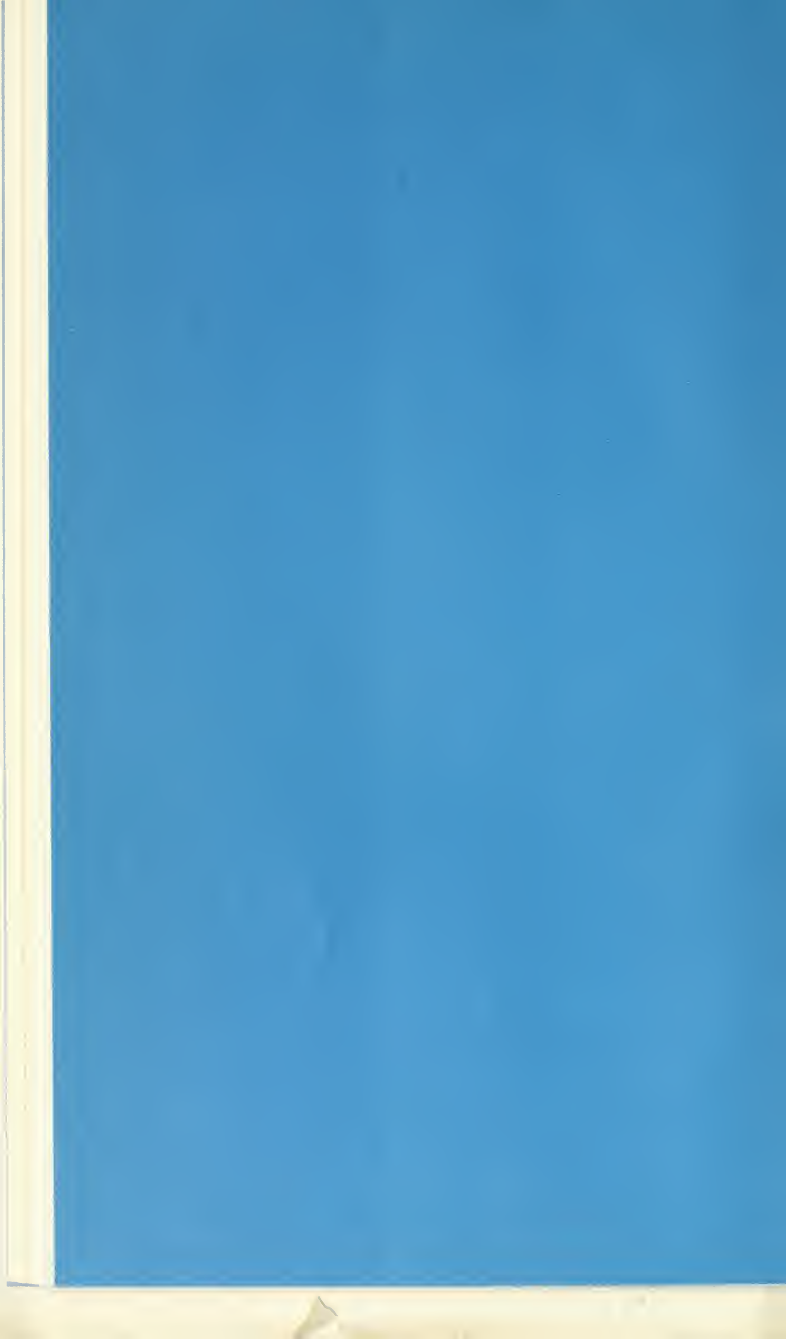
HERBERT B. FINN
125 West Monroe Street
Phoenix, Arizona

SHUTE & ELSING
By W. T. ELSING
505 Title & Trust Bldg.
Phoenix, Arizona

Attorneys for Appellants

(Appendix A follows)





APPENDIX A

In the United States District Court
District of Arizona

No. CIV—1551—Phoenix

Faye M. Barras,
Plaintiff,
vs.
Salt River Valley Water Users,
An Arizona Corporation,
Defendant.

AMENDED ANSWER

Defendant, for its amended answer to plaintiff's complaint, defendant admits, denies and alleges as follows:

I

Defendant alleges that plaintiff's complaint fails to state a claim upon which relief can be granted, and moves the Court for an order dismissing plaintiff's complaint and action.

II

Answering paragraph I of plaintiff's complaint, defendant denies that the purported action herein is one arising under Section 16(b) of the Fair Labor Standards Act of 1938, as amended, and denies that plaintiff's complaint states a cause of action, and denies that this Court has jurisdiction herein under Title 28 U.S.C.A., Section 41(8), or at all.

III

Answering paragraph II of plaintiff's complaint, defendant admits that defendant is a corporation organized and

existing under the laws of the State of Arizona and in this connection defendant alleges that it is a non-profit water users' association or corporation, that it has no assets, and that its operations are without profit. In this connection defendant alleges that it was organized for, and its principal purpose is and has been to assist in carrying out the purposes of the United States Reclamation Act (43 U.S.C.A. 371 et seq.) in relation to the Salt River Project.

Denies that during the two years next preceding the filing of this action, or at any time, defendant was or is now engaged in interstate commerce as defined by Section 3(b) of the Fair Labor Standards Act, or at all, and denies that defendant has been or is now continuously or otherwise engaged as an employer of labor engaged in the production of goods for commerce as defined in Section 3(j) of the Fair Labor Standards Act, or at all. In this connection defendant denies that, except as agent for Salt River Project Agricultural Improvement and Power District (a district organized under the provisions of Article 7 of Chapter 75 A.C.A. 1939), and not otherwise, it has:

> Maintained or operated dams; power plants; lines for distributing electricity; waterway, flumes, canals, conduits or ditches for the distribution of water; or impounded water for the purpose of producing electrical power or for distributing water for irrigation of land; delivered water to power plants or produced power; purchased power outside the State of Arizona or brought power into the State of Arizona; sold, delivered or distributed electrical power to industries or companies in Arizona; sold, distributed or delivered water to industries or companies in Arizona, or otherwise.

In this connection, defendant alleges that under an Agreement (hereinafter called "Agreement"), between defendant and Salt River Project Agricultural Improvement and Power District, (hereinafter called "District"), made and entered into on the 22nd day of March, 1937, and approved on behalf of the United States of America by the Secretary of the Interior Department of said United States on the 18th day of May, 1937, defendant, as agent for District, and not otherwise, maintained and operated the reservoirs, dams, power plants, electrical distribution systems, waterways, canals, flumes, conduits and ditches for the distribution of water; impounded water principally for irrigation and as an incident thereto, produced electricity, sold and distributed water for irrigation, and sold and delivered power principally for pumping water for irrigation; that all revenues collected or received by defendant, were the property of District, and all amounts not required to be expended for maintenance and operation or retained for necessary reserves, were paid over by defendant to District at the end of each calendar year in accordance with the terms of said Agreement; that the Salt River Project was constructed principally with funds supplied by the United States of America under and pursuant to the Reclamation Act (43 U.S.C.A. 371 et seq.) and said Salt River Project is subject to the terms and provisions of said Reclamation Act; that in excess of $20,000,000 remains unpaid on the construction costs of said Salt River Project;

That by Agreement between defendant and District, dated the 12th day of September, 1949 (hereinafter called "Amended Agreement") approved by the Secretary of Interior under date of the 4th day of October, 1949, said Agreement was amended effective the 1st day of November, 1949; that beginning and since the 1st day of November,

1949, defendant, as agent for District and not otherwise, has operated and maintained the irrigation and drainage system of Salt River Project, as such irrigation and drainage system is described and defined in said Amended Agreement; that a true copy of Agreement and Amended Agreement is attached hereto marked "Exhibit A" and by reference made a part hereof; that beginning with and since the 1st day of November, 1949, defendant has not operated or maintained any project of any character and has not engaged in any activity whatsoever, except the operation and management of said irrigation and drainage system as District's Agent pursuant to the provisions of Amended Agreement.

Further answering said paragraph II, defendant denies that, for itself or as agent for said District or otherwise, defendant generated, produced, purchased, sold, delivered, or distributed any electrical power or energy whatsoever, or has operated or maintained any dams, works, plants, transmission or distribution lines, or any other property or thing related to or connected with the generation, production, sale or distribution of electrical power or energy.

IV

Answering paragraph III of plaintiff's complaint, defendant denies that at any time mentioned in plaintiff's complaint defendant, except as agent for said District and not otherwise, sold, distributed or delivered water to any land in the Salt River Valley in Arizona.

Defendant admits, that as agent for said District, and not otherwise, it has employed zanjeros; denies that it requires said zanjeros to be married or to live in a house furnished by defendant; admits that as agent for said District and not otherwise, defendant furnished telephones for said zan-

jeros; denies that the homes or houses of said zanjeros were or are divisional offices of defendant; denies that defendant required, or now requires, said zanjeros to be available twenty-four hours a day or seven days a week. Denies each and every, all and singular, the allegations set forth in paragraph III of plaintiff's complaint not herein specifically admitted.

V

Answering paragraph V of plaintiff's complaint, defendant admits that the plaintiff, and each complainant, is married; denies that plaintiff, or any of the complainants, is the wife of a person employed by the defendant; denies that plaintiff, or any complainant, was on duty at any house or structure of defendant at any time; denies that plaintiff, or any complainant, made or received telephone calls or performed any work or service for defendant at any time whatsoever; denies each and every, all and singular, the allegations of said paragraph V not herein specifically admitted. In this connection, defendant alleges that if plaintiff, or any complainant, has performed any work or service for defendant, such work or service was performed without the knowledge of defendant, and was voluntary and without expectation of compensation on the part of plaintiff and any of said complainants.

VI

Answering paragraphs VI, VII, VIII, IX and X of plaintiff's complaint, defendant denies that the complainants, or any of them, are or were at any time mentioned in plaintiff's complaint, employees of defendant, and denies that defendant is indebted to complainants, or any of them in any amount.

In this connection defendant alleges that for many years prior to the time specified in plaintiff's complaint, the

method and manner of delivering water for irrigation on the Salt River Project and the duties of the zanjeros in respect thereto were identical with the methods of delivering such water and the zanjeros' duties in respect thereto during the time set forth in plaintiff's complaint; that at no time prior to the filing of the complaint herein has the plaintiff, or any complainant, or the wife of any zanjero, claimed to be an employee of defendant or of District, or claimed the right to any compensation from defendant or District; that defendant and District have at all times acted in good faith and in the honest belief, and now believe, that plaintiff, and each of the complainants, is not an employee of defendant or of District.

VII

Defendant denies each and every, all and singular, the allegations of plaintiff's complaint not hereinbefore specifically admitted.

WHEREFORE, having fully answered, defendant prays to be dismissed with its costs herein incurred and expended.

JENNINGS, STROUSS, SALMON & TRASK
By I. A. JENNINGS
Attorneys for Defendant
619 Title and Trust Bldg.
Phoenix, Arizona

[Filed September 15, 1951]

[Verification]